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IN THE

Supreme Court of the United States

October Term, 1957

No. 272

HAROLD HOBART, PETITIONER

v.

MICHAEL P. O'BRIEN, RESPONDENT

and

HAROLD M. HOBART, PETITIONER

v.

JOHN G. DONOVAN ET AL., RESPONDENT

PETITION FOR REHEARING OF THE PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

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Now comes the above-named petitioner and respectfully petitions for a rehearing of this Honorable Court's denial of the Petition for Writ of Certiorari in this cause, and in support thereof, respectfully shows unto this Honorable Court as follows:

POINT I

The discrepancies in the trial of this case, coupled with the failure of the jury to render a verdict in accordance with the weight of the evidence and the disregarding by the jury of the law as to contributory negligence, render it of vital importance that this Honorable Court grant the Writ of Certiorari.

The discrepancies in the trial of this case have been pointed out in the Petition for a Writ of Certiorari and the Reply Brief heretofore filed in this Honorable Court. They consist of derogatory comments by counsel for Mr. O'Brien at trial, as tied in with derogatory comments in closing argument; of argument of counsel which was outside the scope of the evidence; and of argument of counsel which was intended to incite the sympathies and prejudices of the jurors.

The failure of the jury to return a verdict in accordance with the evidence adduced at trial has also been fully set forth in the petition and brief hereinabove referred to. Not only did the jury disregard the weight of the verbal testimony at trial but also the jury must have given credence to the testimony of Mr. O'Brien to the effect that the automobile driven by Dr. Hobart ran into the rear of the left front wheel of the truck driven by Mr. O'Brien. The impossibility of such evidence is clearly shown by defendant's Exhibit E-12 (as set forth on page 593, Volume II, of the Consolidated Record Appendix), in which said picture the left door of the cab of Mr. O'Brien's truck and the running board immediately thereunder are portrayed after the accident. Said picture discloses that said door and running board had not been scratched or hurt in any manner as they necessarily would have been, had Mr. O'Brien's testimony been accurate. Indeed, said picture clearly shows that the left front of the truck driven by Mr. O'Brien, at the bumper, was the part of said truck that was in contact in this

accident, and that Mr. O'Brien's testimony could not be worthy of belief."

In said petition and brief, the law with regard to contributory negligence is fully set forth and refers to testimony adduced at trial so as to conclusively show the failure of the jury to have complied with said law.

It is respectfully submitted that the basic reason why this Honorable Court should consider and should grant the writ of certiorari is that the *composite whole* of these discrepancies, coupled with the failure of the jury to do substantial justice, constitute the special and important reasons why this Honorable Court should grant this Petition for a Writ of Certiorari and, upon consideration of this case, reverse the decision of the United States Court of Appeals for the First Circuit and order a new trial. However, as will be pointed out hereinafter, either of two vital points, standing alone, could well constitute such reason.

POINT II

Counsel for Mr. O'Brien made reference to testimony which was not in fact given at trial by the witness John H. Robinson.

It is respectfully submitted that this Honorable Court should not allow a judgment to stand collectable against a litigant in a case in which counsel for his opponent had, in making counsel's appeal to the jury, made reference to testimony which was not adduced at trial. Counsel for petitioner has made a study of the transcript of the testimony adduced in the trial of this case in the United States District Court for the District of Massachusetts to find out whether or not there was any basis for Mr. Prendergast having made the statement regarding the testimony of the witness John H. Robinson, as found on page 518 of the consolidated record appendix, as follows:

> "I asked him for all the information he could give me which would either help or hurt, and we got talking and I tried to get him to get the records and when I tried to talk about pictures, I tried to get those and then finally in disgust he says if the doctor was over on his own side of the road, this accident wouldn't have happened."

The result of such search is that there is no such testimony. The point regarding Mr. Prendergast having made such reference to such non-existent testimony was clearly brought out in the Petition for Writ of Certiorari filed herein. The answer to such contentions in the Brief in Opposition to Writ of Certiorari did not point out any basis for Mr. Prendergast having made such statement. Instead, counsel for Mr. O'Brien takes the position that a failure by counsel for Dr. Hobart at trial to have objected to the argument constitutes such a waiver of objection as to justify having the litigant Hobart now suffer this terrific judgment against him, all by reason of a failure to make a timely objection. It is respectfully submitted that this brings about a test of the question of whether or not Dr. Hobart received substantial justice in the trial of this case in the United States District Court for the District of Massachusetts. The argument appears to be that since counsel for Dr. Hobart did not make a point of counsel for Mr. O'Brien having made a reference to non-existent testimony, Dr. Hobart should suffer this terrific judgment regardless of whether or not the same constitutes substantial justice.

It is significant that the opinion of the United States Court of Appeals for the First Circuit did not even deal with the point of counsel for Mr. O'Brien having made reference to such non-existent testimony in said counsel's closing argument. Instead said opinion makes reference to an entirely different point regarding the admission of testimony during the cross-examination of the witness Robinson. (Please see pages 50 and 51, Appendix to the Petition for a Writ of Certiorari, filed herein.)

It is respectfully submitted that this point, standing alone, should constitute a sufficient important reason for your Honors to grant the Petition for Writ of Certiorari. *Otherwise, this judgment would stand based at least in part upon argument of counsel regarding at most, if anything, a private conversation between counsel and a witness, who did not see the collision, and not upon testimony adduced at trial.*

POINT III

Re Point regarding verdict not having been in accordance with the evidence and the weight of the evidence.

It is respectfully submitted that the failure of the jury to render a verdict in accordance with the evidence and the weight of the evidence, as applied to the law regarding contributory negligence, standing alone, would constitute a special and important reason why this Honorable Court should grant the Writ of Certiorari and hear argument of counsel in this case.

The position taken by the United States Court of Appeals for the First Circuit with regard to this point is thoroughly discussed on pages 28 through 34 of the Petition for Writ of Certiorari filed herein. It remains unbelievable that a "fair-minded" jury could come to the conclusion that Mr. O'Brien was driving on his side of the road and was not, at least, guilty of contributory negligence.

By the vast preponderance of the evidence and by the pictures introduced in evidence, and, more particularly, defendant's Exhibit E-12, referred to hereinabove under Point I, Mr. O'Brien must have been, at least, guilty of contributory negligence. Indeed, Mr. O'Brien's testimony is rendered unbelievable and he should have been held solely liable by a "fair-minded" jury.

It is respectfully submitted that this point, standing alone, furnishes a sufficiently important and special rea-

son for your Honors to grant the Petition for Writ of Certiorari filed herein.

CONCLUSION

There can be no question but that Dr. Hobart is the victim of a gross miscarriage of justice as a result of the trial in the United States District Court for the District of Massachusetts. The unwarranted references to one of his attorneys to the effect that said counsel could not be trusted or that he would not tell the truth; the quoting of alleged evidence which was not adduced at trial; the pleas to the jury by counsel for Mr. O'Brien, which said pleas were obviously intended to incite the passions and prejudices of the jury; the failure of the jury to base its decision upon the vast preponderance of the testimony and the physical facts as same were brought to their attention at the trial; and the failure of the jury to at least apply said evidence to the law regarding contributory negligence all lead to the inescapable conclusion that Dr. Hobart did not receive substantial justice in this case. The principal points regarding the opinion of the United States Court of Appeals have been set forth hereinabove.

With regard to the requirement that there must be special and important reasons as conditions precedent to this Honorable Court granting a Writ of Certiorari and hearing argument of counsel, it is respectfully submitted that nothing can be more vital to our Constitutional system than that this Honorable Court should exercise supervisory powers where, as in the case which is the subject of this petition, a litigant stands at the mercy of his opponent after a trial in which a gross miscarriage of justice resulted from the discrepancies pointed out hereinabove.

It is most respectfully urged that your Honors reconsider the Petition for Writ of Certiorari filed herein and

grant to petitioner the opportunity to have his counsel argue this case.

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CERTIFICATE OF COUNSEL

The undersigned, attorneys for the Petitioner herein, do hereby certify that the above and foregoing petition is presented in good faith and not for delay, and that the above petition is restricted to the grounds specified in Paragraph 2 of Rule 58 of this Honorable Court.

FORD E. YOUNG, JR.
JOSIAH LYMAN
Attorneys for Petitioner